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FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Jul 05, 2022

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JUANA R. R¹,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY ADMINISTRATION,

Defendant.

No. 2:21-CV-03135-SAB

**ORDER DENYING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT;
GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT**

Before the Court are Plaintiff's Motion for Summary Judgment, ECF No. 11, and Defendant's Cross-Motion for Summary Judgment, ECF No. 12. The motions were heard without oral argument. Plaintiff is represented by D. James Tree. Defendant is represented by Danielle Mroczek and Brian Donovan. For the reasons set forth below, the Court denies Plaintiff's motion, grants Defendant's motion, and affirms the administrative law judge ("ALJ") decision denying benefits.

¹ Pursuant to the recommendation of the Committee on Court Administration and Case Management of the Judicial Conference of the United States, Plaintiff's name is partially redacted.

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Jurisdiction

On April 15, 2015, Plaintiff filed an application for Title II benefits, alleging disability beginning July 7, 2008.² On June 22, 2021, Plaintiff appeared and testified at a telephonic hearing before an ALJ. She was assisted by attorneys D. James Tree and Robert E. Tree. Susan Foster, vocational expert also participated. The ALJ issued a decision on August 4, 2021, finding that Plaintiff was not disabled.

8 Plaintiff filed a timely appeal with the United States District Court for the
9 Eastern District of Washington on October 19, 2021. ECF No. 1. The matter is
10 before this Court under 42 U.S.C. § 405(g).

Sequential Evaluation Process

The Social Security Act defines disability as the “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). A claimant shall be determined to be under a disability only if their impairments are of such severity that the claimant is not only unable to do their previous work, but cannot, considering claimant’s age, education, and work experiences, engage in any other substantial gainful work that exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). The Commissioner has established a five-step sequential evaluation process to

²⁴ Plaintiff's application was denied initially and on reconsideration. Plaintiff filed a
²⁵ written request for hearing on January 6, 2016. A hearing was held before an ALJ
²⁶ on July 20, 2017. The ALJ affirmed the denial of benefits. Plaintiff appealed that
²⁷ decision to the district court. On April 20, 2020, the district court reversed and
²⁸ remanded the case. *See* 1:19-CV-03021-RHW, ECF No. 14.

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1 determine whether a person is disabled in the statute. See 20 C.F.R. §§
 2 404.1520(a)(4)(i)-(v), 416.920(a)(4)(i)-(v).

3 **Step One:** Is the claimant engaged in substantial gainful activities? 20 C.F.R.
 4 §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). Substantial gainful activity is work done for
 5 pay and requires compensation above the statutory minimum. *Keyes v. Sullivan*,
 6 894 F.2d 1053, 1057 (9th Cir. 1990). If the claimant is engaged in substantial
 7 activity, benefits are denied. 20 C.F.R. § 404.1520(b), 416.920(b). If the claimant
 8 is not, the ALJ proceeds to step two.

9 **Step Two:** Does the claimant have a medically-severe impairment or
 10 combination of impairments? 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). A
 11 severe impairment is one that lasted or must be expected to last for at least 12
 12 months and must be proven through objective medical evidence. *Id.* §§ 404.1509,
 13 416.909. If the claimant does not have a severe impairment or combination of
 14 impairments, the disability claim is denied. *Id.* § 404.1520(a)(4)(ii),
 15 416.920(a)(4)(ii). If the impairment is severe, the evaluation proceeds to the third
 16 step.

17 **Step Three:** Does the claimant's impairment meet or equal one of the listed
 18 impairments acknowledged by the Commissioner to be so severe as to preclude
 19 substantial gainful activity? 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If
 20 the impairment meets or equals one of the listed impairments, the claimant is
 21 conclusively presumed to be disabled. 20 C.F.R. §§ 404.1520(d), 416.920(d). If the
 22 impairment is not one conclusively presumed to be disabling, the evaluation
 23 proceeds to the fourth step.

24 Before considering to the fourth step, the ALJ must first determine the
 25 claimant's residual functional capacity. An individual's residual functional
 26 capacity is their ability to do physical and mental work activities on a sustained
 27 basis despite limitations from their impairments. 20 C.F.R. §§ 404.1545(a)(1),
 28

1 416.945(a)(1). The residual functional capacity is relevant to both the fourth and
 2 fifth steps of the analysis.

3 **Step Four:** Does the impairment prevent the claimant from performing work
 4 they have performed in the past? 20 C.F.R. §§ 404.1520(a)(4)(iv),
 5 416.920(a)(4)(iv). If the claimant is able to perform their previous work, they are
 6 not disabled. 20 C.F.R. §§ 404.1520(f), 416.920(f). If the claimant cannot perform
 7 this work, the evaluation proceeds to the fifth and final step.

8 **Step Five:** Is the claimant able to perform other work in the national
 9 economy in view of their age, education, and work experience? 20 C.F.R. §§
 10 404.1520(a)(4)(v), 416.920(a)(4)(v). The initial burden of proof rests upon the
 11 claimant to establish a *prima facie* case of entitlement to disability benefits. *Tackett*
 12 *v. Apfel*, 108 F.3d 1094, 1098 (9th Cir. 1999). This burden is met once a claimant
 13 establishes that a physical or mental impairment prevents him from engaging in her
 14 previous occupation. *Id.* At step five, the burden shifts to the Commissioner to
 15 show that the claimant can perform other substantial gainful activity. *Id.*

16 I. Standard of Review

17 The Commissioner's determination will be set aside only when the ALJ's
 18 findings are based on legal error or are not supported by substantial evidence in the
 19 record as a whole. *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir. 1992) (citing
 20 42 U.S.C. § 405(g)). Substantial evidence is "more than a mere scintilla,"
 21 *Richardson v. Perales*, 402 U.S. 389, 401 (1971), but "less than a preponderance,"
 22 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975). Substantial
 23 evidence is "such relevant evidence as a reasonable mind might accept as adequate
 24 to support a conclusion." *Richardson*, 402 U.S. at 401.

25 A decision supported by substantial evidence will be set aside if the proper
 26 legal standards were not applied in weighing the evidence and making the decision.
 27 *Brawner v. Secr'y of Health & Human Servs.*, 839 F.2d 432, 433 (9th Cir. 1988).
 28 An ALJ is allowed "inconsequential" errors as long as they are immaterial to the

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1 ultimate nondisability determination. *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d
2 1050, 1055 (9th Cir. 2006). The Court must uphold the ALJ's denial of benefits if
3 the evidence is susceptible to more than one rational interpretation, one of which
4 supports the decision of the administrative law judge. *Batson v. Barnhart*, 359 F.3d
5 1190, 1193 (9th Cir. 2004). It "must consider the entire record as a whole,
6 weighing both the evidence that supports and the evidence that detracts from the
7 Commissioner's conclusion, and may not affirm simply by isolating a specific
8 quantum of supporting evidence." *Revels v. Berryhill*, 874 F.3d 648, 654 (9th Cir.
9 2017) (quotation omitted). "If the evidence can support either outcome, the court
10 may not substitute its judgment for that of the ALJ." *Matney*, 981 F.2d at 1019.

Statement of Facts

12 The facts have been presented in the administrative transcript, the ALJ's
13 decision, and the briefs to this Court; only the most relevant facts are summarized
14 here.

15 Plaintiff was 37 years old on the alleged date of onset. She attended school
16 through the sixth grade in Mexico. Her preferred language is Spanish. She has little
17 English skills. She is a naturalized U.S. citizen and has a drivers' license. Plaintiff
18 and her husband have six children, who, at the time of the hearing, were between
19 the ages of 34 and 14.

20 While working as a farmworker in 2008, she fell and injured her right
21 shoulder. At the time, she was working as a bin checker. This involved checking
22 the work of the pickers and tracking bins, and making notations on a clipboard.
23 She had surgery on her shoulder in 2012 after she continued to experience
24 subluxation (dislocation) of her shoulder.

At the hearing, Plaintiff testified that the pain and mobility in her right shoulder has gotten worse. She testified that she now experiences left shoulder pain because she has been using it more. She testified that she has good days and bad days, but on bad days, she rests and uses pain medication. As a result of her pain

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1 and limitations, she experiences depression.

2 The ALJ's Findings

3 At step one, the ALJ found Plaintiff has not engaged in substantial gainful
 4 activity since July 7, 2008, the alleged onset date through December 31, 2012, her
 5 date last insured. AR 684.

6 At step two, the ALJ found Plaintiff has the following severe impairments:
 7 degenerative changes to the right shoulder; anterior right shoulder dislocation;
 8 status post arthroscopic debridement and stabilization; and degenerative disc
 9 disease of the spine. AR 684.

10 At step three, the ALJ found that Plaintiff's impairments or combination of
 11 impairments do not meet or medically equal any Listing. AR 685.

12 The ALJ concluded that Plaintiff has the residual functional capacity to
 13 perform:

14 light work as defined in 20 CFR 404.1567(b) except with the
 15 following additional limitations: she can occasionally push and pull;
 16 she must avoid repetitive pushing or pulling. She has an unlimited
 17 ability to climb ramps and stairs, but she can never climb ladders,
 18 ropes, or scaffolds. She is unlimited in balancing, stooping, kneeling,
 19 and crouching. She can frequently crawl. She cannot reach overhead
 20 with the right arm; she can only reach in other directions with the
 right arm on a frequent basis. She can lift ten pounds with the
 right hand if only using the right hand, but can lift 20 pounds if using
 the left upper extremity or both upper extremities.

21 AR. 685.

22 At step four, the ALJ found that Plaintiff is capable of performing past
 23 relevant work as a checker I, and therefore is not under a disability. AR 691-92.

24 Issues for Review

- 25 1. Did the ALJ properly evaluate Plaintiff's symptom testimony?
- 26 2. Did the ALJ properly evaluate the medical opinion evidence?
- 27 3. Did the ALJ properly evaluate the lay testimony?

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Discussion

Plaintiff is seeking Title II benefits, beginning July 7, 2008. Because her date last insured is December 31, 2012, she must establish disability beginning July 7, 2008 through December 31, 2012.

1. Plaintiff's Symptom Testimony

Plaintiff alleges that she is unable to work due to shoulder pain and depression. The ALJ concluded that the medical evidence is not entirely consistent with her allegations.

In determining whether a claimant’s testimony regarding subjective pain or symptoms is credible, the ALJ engages in a two-step analysis. *Garrison v. Colvin* 759 F.3d 995, 1014 (9th Cir. 2014). “First, the ALJ must determine whether the claimant has presented objective medical evidence of an underlying impairment which could reasonably be expected to produce the pain or other symptoms alleged.” *Id.* (citation and quotation omitted). If the claimant satisfies the first step of the analysis, and there is no evidence of malingering, the ALJ can reject the claimant’s testimony about the severity of their symptoms “only by offering specific, clear and convincing reasons for doing so.” *Id.* (citation and quotation omitted). “This is not an easy requirement to meet: The clear and convincing standard is the most demanding required in Social Security cases.” *Id.* (citation and quotation omitted). That said, if the ALJ’s credibility finding is supported by substantial evidence in the record, the reviewing court “may not engage in second-guessing.” *Thomas v. Barnhart*, 278 F.3d 947, 959 (9th Cir. 2002).

In recognition of the fact that an individual's symptoms can sometimes suggest a greater level of severity of impairment than can be shown by the objective medical evidence alone, 20 C.F.R. §§ 404.1529(c) and 416.929(c) describe the kinds of evidence, including the factors below, that the ALJ must consider in addition to the objective medical evidence when assessing the credibility of an individual's statements:

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1 1. Daily activities; 2. The location, duration, frequency, and
 2 intensity of pain or other symptoms; 3. Factors that precipitate and
 3 aggravate the symptoms; 4. The type, dosage, effectiveness, and
 4 side effects of any medication an individual takes or has taken to
 5 alleviate pain or other symptoms; 5. Treatment, other than
 6 medication, an individual receives or has received for relief of pain
 7 or other symptoms; 6. Any measures other than treatment an
 8 individual uses or has used to relieve pain or other symptoms (e.g.,
 9 lying flat on his or her back, standing for 15 to 20 minutes every
 10 hour, or sleeping on a board); and 7. Any other factors concerning
 11 an individual's functional limitations and restrictions due to pain or
 12 other symptoms.

10 SSR 16-3P, 2017 WL 5180304.

11 Daily activities may be grounds for an adverse credibility finding if (1)
 12 Plaintiff's activities contradict her other testimony, or (2) Plaintiff "is able to spend
 13 a substantial part of [her] day engaged in pursuits involving the performance of
 14 physical functions that are transferable to a work setting." *Orn v. Astrue*, 495 F.3d
 15 625, 639 (9th Cir. 2007) (citing *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)).

16 The ALJ provided clear and convincing reasons that are supported by
 17 substantial evidence in the record for concluding that Plaintiff's allegations of
 18 disability are not credible. Although the evidence established the existence of
 19 shoulder and spinal impairments that resulted in limitations, it did not support the
 20 existence of disabling limitations. The ALJ reasonably relied on inconsistency
 21 between the objective medical evidence from July 2008 through December 2012
 22 and her complaints of disabling pain during this time. Imaging and studies
 23 generally were unremarkable, except for a rotator cuff tear and mild degenerative
 24 changes, but these were not believed to be related to Plaintiff's injury. The record
 25 demonstrated that she had improvement of her symptoms after surgery. The ALJ
 26 noted that Plaintiff engaged in activities that suggested she was not as limited as
 27 she alleged, and at least one evaluator believed that Plaintiff was more active than
 28 she wished to be known. The ALJ noted that Plaintiff is able to drive, which is

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1 inconsistent with Plaintiff's allegations of disabling pain caused by her shoulders.
 2 The ALJ's conclusions are supported by substantial evidence.

3 For these same reasons, the ALJ reasonably evaluated the lay witness's
 4 statements, who, for the most part, made similar allegations. The ALJ gave
 5 germane reasons for rejecting the testimony of Plaintiff's daughters, former
 6 colleagues, and friends.

7 **2. Evaluation of Medical Opinion Evidence**

8 The medical opinion of a claimant's treating physician is given "controlling
 9 weight" as long as it "is well-supported by medically acceptable clinical and
 10 laboratory diagnostic techniques and is not inconsistent with the other substantial
 11 evidence in [the claimant's] case record." 20 C.F.R. § 404.1527(c)(2); *Trevizo v.*
 12 *Berryhill*, 871 F.3d 664, 675 (9th Cir. 2017). When a treating physician's opinion
 13 is not controlling, it is weighted according to factors such as the length of the
 14 treatment relationship and the frequency of examination, the nature and extent of
 15 the treatment relationship, supportability, consistency with the record, and
 16 specialization of the physician. § 404.1527(c)(2)-(6). "If a treating or examining
 17 doctor's opinion is contradicted by another doctor's opinion, an ALJ may only
 18 reject it by providing specific and legitimate reasons that are supported by
 19 substantial evidence. *Trevizo*, 871 F.3d at 675 (quoting *Ryan v. Comm'r of Soc.*
 20 *Sec.*, 528 F.3d 1194, 1198 (9th Cir. 2008)). "[A]n ALJ errs when he rejects a
 21 medical opinion or assigns it little weight while doing nothing more than ignoring
 22 it, asserting without explanation that another medical opinion is more persuasive,
 23 or criticizing it with boilerplate language that fails to offer a substantive basis for
 24 his conclusion." *Garrison*, 759 F.3d at 1012–13 (citing *Nguyen v. Chater*, 100 F.3d
 25 1462, 1464 (9th Cir. 1996)).

26 **A. Dr. Fred Thysell**

27 Dr. Fred Thysell was Plaintiff's family medicine provider. Dr. Thysell
 28 opined that Plaintiff could perform a reduced range of light level work. In 2011, he

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1 identified that Plaintiff had a limited ability to use her right arm/hand to reach,
2 work above shoulder height, grasp, lift, carry, push and pull. The ALJ concluded
3 that his opinion regarding the limitations was unhelpful due the vagueness. That
4 said, the ALJ seemingly incorporated Dr. Thysell's limitations in the RFC by
5 specifying occasionally push and pull, but avoidance of repetitive pushing or
6 pulling; and no reaching overhead with the right arm while only reaching in other
7 directions with the right arm on a frequent basis. Thus, any perceived error by the
8 ALJ in evaluating Dr. Thysell's opinions would have been harmless.

9 **B. Dr. Silverio Arenas, Jr., Ph.D**

10 Dr. Arenas examined Plaintiff in 2017. Based on this examination, he
11 assessed marked mental health limitations because of his diagnoses of somatic
12 symptoms disorder, major depressive disorder, anxiety disorder, and post-traumatic
13 stress disorder. Dr. Arenas cited Plaintiff's 2008 injury as the source of her
14 psychological conditions.

15 The ALJ gave no weight to Dr. Arenas's 2020 and 2021 opinions. The ALJ
16 gave specific and legitimate reasons for doing so that are supported by substantial
17 evidence in the record. First, the ALJ noted that Dr. Arenas saw Plaintiff only one
18 time for a 2017 psychological evaluation and therefore had little foundation upon
19 which to base his later opinions. Second, the ALJ noted that while Dr. Arenas
20 indicated Plaintiff's limitations dated back to at least July 2008, he cited to no
21 specific objective evidence to support this statement. The ALJ reasonably found
22 that the opinions from a one-time examiner at least nine years after the period at
23 issue was not instructive to Plaintiff's level of functioning during that period.
24 Consequently, the ALJ's rejection of Dr. Arenas's diagnosis of somatic symptom
25 was proper. There is nothing in Dr. Arenas's report to support a finding that
26 Plaintiff had suffered from this diagnosis between 2008 and 2012.

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Conclusion

Because the ALJ's opinion that Plaintiff was capable of performing past work is supported by substantial evidence and free of legal error, Plaintiff's Motion for Summary Judgment is denied, and Defendant's Motion for Summary Judgment is granted.

Accordingly, IT IS HEREBY ORDERED:

1. Plaintiff's Motion for Summary Judgment, ECF No. 11, is **DENIED**.
 2. Defendant's Motion for Summary Judgment, ECF No. 12, is **GRANTED**.
 3. The decision of the Commissioner denying benefits is **affirmed**.
 4. The District Court Executive is directed to enter judgment in favor of

IT IS SO ORDERED. The District Court Executive is hereby directed to file this Order, provide copies to counsel, and **close** the file.

DATED this 5th day of July 2022.



Stanley A. Sestini

Stanley A. Bastian
Chief United States District Judge

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